NO. 15871

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CLARENCE A. KOLSTAD and ALTA A. KOLSTAD,
Appellants,

—vs.—

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S BRIEF

Appearances:

FOR APPELLANTS:

Messrs. Cedor B. Aronow and Elmo J. Cure,
Attorneys-at-Law,
153 Main Street,
Shelby, Montana.

FOR APPELLEE:

Mr. Krest Cyr, United States Attorney, Box 396, Butte, Montana.

Mr. Dale F. Galles, Assistant United States Attorney, Box 1478, Billings, Montana.

Perry W. Morton, Assistant Attorney General;

Roger P. Marquis, Chief, Appellate Section;

Elizabeth Dudley, Attorney, Dept. of Justice, Lands Division, Washington, D. C.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA

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STATEMENT OF JURISDICTION

The juristiction of the United States District Court is based on 28 USCA 1345, Judiciary and Judicial Procedure. The Jurisdiction of the Court of Appeals is based on 28 USCA §1291, Judiciary and Judicial Procedure. A final judgment of the District Court was filed and entered March 8, 1957 (transcript 28-32) and notice of appeal was filed April 19, 1957 (transcript p. 32). An order by the District Court denying Defendant-Appellant's motion to set aside the judgment under Rule 60B of the Federal Rules of Civil Procedure was filed and entered December 6, 1957 (transcript pp. 52-61). Notice of appeal from the said order was filed January 2, 1958 (transcript p. 62).

STATEMENT OF THE CASE

This is an action commenced by the United States to condemn certain lands in connection with the Tiber dam and reservoir in north central Montana. A complaint was filed in District Court where several different parcels were joined in one unit. The land described in Parcel No. 10 (transcript pp. 8-12) is the land with which this appeal is concerned. The complaint described the owners of Parcel No. 10 as C. A. Kolstad, also known as Clarence A. Kolstad, and Alta A. Kolstad, husband and wife, and others, (mainly in connection with oil and gas lease), who were later defaulted (transcript p. 5), Subsequently,

the matter came on for trial, and the defendants opened with the testimony of Clarence A. Kolstatd. The court, after hearing the testimony of Mr. Kolstad, as reported on pages 121 and 122 of the transcript, stopped the trail and had a discussion with counsel. The court, without further evidence, and having been advised that the lands were held as partnership lands, ruled that they were not owned by the partnership (transcript pp. 124 and 137). Having made this ruling, it then required counsel for the appellant to furnish him authority that lands held in separate ownership could be tried as a unit, and compensation be given as a unit. Counsel was unable to furnish him such authority, and was then required to proceed with the trial of the case, dividing Parcel No. 10 into three parcels, mainly the ownership of Clarence A. Kolstad, the ownership of Alta A. Kolstad, and the joint ownership of the two. The case then proceeded to judgment, and appellants being dissatisfied with the judgment, appealed to this Honorable Court.

Thereafter, appellants filed the motion to set aside the judgment, under the provisions of Rule 60B, Federal Rules of Civil Procedure (Transcript p. 34). In support of his motion, appellant, Clarence A. Kolstad filed an affidavit (Transcript pp. 35 - 47). Attached to the affidavit were numerous exhibits which are not printed in the transcript, but which have been desig-

nated and forwarded to the Clerk of the Court of Appeals. An order denying the motion to vacate the judgment was filed and entered december 6, 1957. (transcript pp. 52-61) and appellants appealed from this order (transcript p. 62).

SPECIFICATIONS OF ERROR

1. The Court erred in denying Appellants' motion to set aside the judgment.

2. The Court erred in ordering the trial to proceed on the theory of divided ownership of the land.

3. Accident and surprise which ordinary prudence could not have guarded against in the testimony of Joe Meissner.

ARGUMENT

1. The Court Erred in Denying Appellants' Motion to Set Aside the Judgment.

It is the contention of appellants that the lands involved in this litigation were actually held by appellants as tenants in partnership, regardless of in whose name the bare legal title stood, and because of this, appellants should have been allowed to introduce evidence showing the partnership ownership and the value of the entire parcel before the taking and after the taking.

The Court, after hearing some evidence

on how appellants acquired the property, dismissed the jury from the court room for discussion with counsel (transcript pp. 121 and 122) At this time, all that appellant Kolstad had testified to was the manner of acquisition of one parcel. He had not at that time testified as to the status of the title at the time of the taking. Counsel for appellant attempted to advise the court that the property was held by the partnership of appellants (transcript pp. 124-126). The court rejected the offer of proof, and ruled that there were three separate ownerships of the tract (transcript p. 124 and p. 137). The court should have allowed the evidence of the partnership ownership to the land to be given.

In then proceeding with the trial, counsel for appelants was merely acknowledging the ruling of the Court, that the three parcels were separately owned.

At the discussion, it is important to note that counsel for appellants was making two contentions: 1, that there was one ownership of the entire tract; and 2, that even though there were separate ownerships, that they could be tried together and one award made. When the trial court (tr. p. 144) gave appellant one week to brief the question, it was the second proposition advanced that was to be briefed (tr. p. 56).

The Court arbitrarily, at the trial, ruled the land was separately owned, and then asked for authority that though separately own-

ed, they could be tried as a unit. The very same error was repeated in the trial Court's ruling on the motion to vacate the judgment (transcript p. 56, 57).

In support of their motion under Rule 60 (B), Federal Rules of Civil Procedure, appellants filed a comprehensive affidavit with numerous exhibits. Rule 43 (e), F. R. C. P., provides:

> **"Evidence on Motions. When a motion is based on facts not appearing of record the court may hear the matter on affidavits presented by the respective parties, but the court may direct that the matter be heard wholly or partially on oral testimony or depositions"**

See also Jones vs. Jones 217F. 2d 239.

At the hearing on the motion under Rule 60 (b), no evidence was before the court except that contained in the transcript of the trial, and in the affidavit of appellant Clarence A. Kolstad. The evidence contained in the affidavit was uncontradicted, and clearly showed that the fact of partnership ownership was of long standing, and **not a recent contrivance.**

Where part of a parcel of land is taken by eminent domain, and severance damages are claimed as to the remainder, it must be shown: 1, that the land is unified in owner-

ship; 2, that the land is physically contiguous; and 3, that the land is unified in use. It is conceded that all of the lands in the three tracts are physically contiguous and unified in use. The only question remining, then, is whether the land is unified in ownership.

This question arose directly in City of Stockton vs. Ellingwood, 275 P. 228, p. 243. "In action No. 3176, as that number appeared in the case below, being for the condemnation of 310 acres belonging to Louis Vogelgesang, appellant contends that the court erred in relation to severance damages. The complaint mentions only 480 acres of land standing in the names of the two parties just mentioned, out of which it is proposed to take 310 acres. The two Vogelgesangs, by their answer, set forth that the 480 acres, out of which it is sought to take 310 acres, was really a part of a larger parcel containing 1820 acres. It appears from the map set forth in appellant's brief that the 1820 acres, irrespective of the question of ownership, lies in one continuous parcel. The contention is made by appellant that as different governmental subdivisions of said tract appear of record in the names of the different defendants, some of the tracts in the name of Gutsav Vogelgesang, and other governmental subdivisions appearing in the name of Louis Vogelgesang, there is not a unity of ownership.

"The defendants, by their answer, to which we have referred, allege that the land is in

fact owned by them as partners, and the testimony set forth in the record warranted the court in finding that while the different governmental subdivisions of the tract stood of record in the names of the different defendants, it was in fact owned by the partnership. The testimony shows that the two defendants were using the tract, as described in their answer, as one parcel. * * * "

" * * * In the case of Perelli-Minetti et al. v. Lawson et al., 272 P. 573, the Supreme Court of this state adopted as its opinion the opinion of this court prepared by Presiding Justice Finch, setting forth the rule of law as to when real estate may be held to be partnership property, though standing in the names of different partners, which is applicable here. The ownership of the property is in fact what is involved. The record shows further that the real estate used as one parcel and standing in the names of the different partners was purchased with partnership funds, * * * The partnership, in fact, was shown to be the owner and in the use and occupation of the 1820 acres. That the tract was used as one parcel appears not to be disputed. * * *"

"* * * Unity of use is simply not alone sufficient. There must be contiguity; that is, the governmental subdivisions must in fact constitute one parcel, and not divided by either natural or artificial objects or ways so

as to divide the land into two or more separate parcels. The question of ownership also enters into the consideration. The partnership being the owner, the different governmental subdivisions all being contigous, and there being unity in use, we conclude that the trial court did not err in considering the whole tract as one parcel, * * *"

The Montana cases follow the California cases, in that they hold that in determining whether land standing in the names of partners as individuals is partnership property is determined by understanding and intention. In Rockefeller vs. Dellinger, 56 P. 822, 22 Mont 418, the Court said:

> "The intention of the parties at the time the conveyance was made is the proper criterion by which to determine whether the real estate granted to them then became a portion of the partnership assets. To evince presumptively the intention to take and hold land as partnership property, which has been conveyed to the several copartners, nothing need be shown, except that the land was purchased with partnership assets or funds; and, in the absence of all circumstances tending to prove the intention to have been otherwise, that presumption will usually control and be conclusive."

In Rinio v. Kester, 41 P. 2d, 406; 99 Mont. 1, the Court said:

"Plaintiff adduced testimony tending to show that all of the property in question was used by the copartnership in carrying on the partnership business; that it was treated by the partners as partnership property; that taxes, repairs, insurance, etc., were paid out of partnership funds; that from the partnership income tax returns the partnership had deducted, as a portion of its expense, taxes paid on the property in question. * * * Indeed, it appears that there is sufficient evidence upon which the court could base its findings that the property was in truth and in fact owned by the partnership."

Sec. 63-108, R.C.M., 1947, provides:

"(1) All property originally brought into the partnership stock or subsequently acquired by purchase or otherwise on account of the partnership, is partnership property.

(2) Unless the contrary intention appears, property acquired with partnership funds is partnership property. * * * "

Sec. 63-402, R. C. M., 1947, Provides.

"(1) A partner is co-owner with his partners of specific partnership property holding as a tenant in partnership. * * * "

40 Am. Jur., Partnership, Par. 97, states:

"GENERALLY.–The question of firm ownership of real property has made a most fruitful source of litigation, with a wide variety of opinions making the matter difficult of solution. Under the rule which has the support of the best authority, and which rests on sound principle, the intention of the partners at the time the property was acquired, as shown by the facts and circumstances surrounding the transaction of purchase, considered with the conduct of the parties toward the property after the purchase must govern. * * * "

§103–TITLE IN NAME OF SINGLE PARTNER—Real estate acquired by partners, in a partnership business and for its purposes, constitutes partnership assets, although the legal title is taken in the name of one of the partners. In other words, real estate is not necessarily the individual property of the member of a firm because the title is held by such members in his individual name. Whether such property is, as between the partners, to be treated as partnership property must be determined by ascertaining from their conduct and course of dealing their understanding and intention."

The uncontradicted evidence in the affidavit of Clarence A. Kolstad (Transcript p. 36-40), shows: (1), that it was the intention of the parties that the lands be held as partnership property; (2,) that the lands were operated as a partnership; (3), that the parties made a partnership income tax return; (4), that depreciation on improvements on the land was taken on the partnership return; (5), that the proceeds of the crops grown on the lands were deposited in the partnership account; (6), that taxes and insurance on lands and improvements were paid with partnership funds; (7), that no rent was paid for the use of the lands by the partnership to an individual partner; (8), that the ranches were purchased with partnership funds.

In 53 Am. Jur., Trial, §218, p. 196, it is stated:

> "INTENTION, GENERALLY – The question of the intent or motive of a person, when material, is ordinarily one of fact to be determined by the jury from the evidence adduced upon that issue. * * * "

and in §244, p. 210, it is stated:

> "PROPERTY RIGHTS; OWNERSHIP, TITLE AND POSSESSION – The ownership of property when an issue in a case is a mixed question of law and fact. If the facts are not in

> dispute and if different inferences cannot reasonably be drawn from the undisputed facts, ownership is a question for the court; but where the evidence is conflicting or the facts are in dispute, or are not conclusive, the determination of ownership should be left to the jury under proper instructions from the court, assuming there is substantial evidence which would support a finding in favor of either party. * * * "

In any event, evidence should have been received concerning the partnership ownership, and it was error for the Court to exclude it.

(2) The Court Erred in Ordering the Trial to Proceed on the Theory of Divided Ownership of the Land.

It seems to be conceded (transcript p. 125, 126) that the larger the unit the more economical the operation, and consequently the greater the market value, and where there is a taking under eminent domain or condemnation, the greater the severance damage.

As stated before, it seems conceded that greater severance damage would have resulted had evidence of value been allowed to be introduced on the whole tract before and after the taking. It should be noted that respondent made no objection to the introduction

of value as to the whole tract (transcript p. 122).

Counsel for appellants indicated to the Court, outside the presence of the jury, that there was a partnership ownership, and without hearing any evidence, the Court (transcript p. 137) ruled that there were separate ownerships.

As is stated in 3 Am. Jur., Appeal and Error, §1032, p. 589:

> "EXAMPLES OF PREJUDICIAL ERROR – * * * The general principal has been laid down that where the facts of the case are such that the appellate court cannot say that if evidence erroneously excluded had been admitted, the jury would have returned the same verdict, the exclusion of such evidence will be held to be reversible error. If the erroneous exclusion injuriously affects a substantial right, then there is reversible error. It is generally held to affect a substantial right if it relates to a material point. * * * "

Appellants were foreclosed from introducing evidence or law as to the one ownership (transcript p. 142, 144). The Court did give appellants the right to submit a brief on the question of whether one value could be put on separate ownerships (transcript p. 144)

and this was so understood by respondents (transcript p. 148). The evidence of partnership ownership was material, and it was reversible error to exclude it.

In the interests of brevity, appellant desires to incorporate under this specification of error the argument, facts and law set forth under the first specification of error.

(3) Accident and Surprise Which Ordinary Prudence Could Not Have Guarded Against, in the Testimony of Joe Miessner.

The government put on the witness Joe Meissner, and qualified him on page 465 of the transcript, et seq., that he and his brothers farmed the Kolstad lands for six years and he talked of all of the lands of the appellants as one unit and testified as to the production therefrom and his testimony was grossly incorrect to the extent of some twenty-one thousand dollars of income for two years. It appears by the affidavit of Mr. Kolstad (transcript p. 44) it was impossible to examine and prepare the total wheat sales at the time of the trial. Joe Meissner did not have them at the trial. The government put on witnesses such as George H. Gau, P. R. MacMale, Thomas Virden and Henry Murray, who testified as to the value of the appellants' lands. Certainly, the production and the income derived from said lands had a great deal of bearing on the value and if such witnesses made inquiry and obtained information as to

the income produced by said lands from Joe Meissner and Mr. Virden of the Bureau of Reclamation who helped Joe Meissner prepare the figures, such witnesses received erroneous information and all of their calculations were erroneous. Joe Meissner was presented by the respondent condemnor as a man who lived and farmed and operated the lands involved herein, in a single unit, for some six years and knew what the production and income was. Either from lack of due care, improper investigation, or some other cause, the Bureau of Reclamation presented to the jury erroneous information which the appellants could not know and could not suspect that Joe Meissner would deliberately or through carelessness give incorrect testimony as to the amount of grain he raised and marketed from the one unit ranch of the appellants which the Meissner Brothers leased.

Likewise, the testimony of Joe Meissner as to the acquisition of the Brinkman lands was erroneous in two respects. It was erroneous as to the date when the deal was made, as the John Brinkman affidavit indicates that no deal was made until the money was paid and the deeds delivered. which was after the date of the order of condemnation, and the second ..erroneous information given by Joe Meissner in this respect was that the acquisition of the Brinkman land was an arm's length transaction and established market price on a comparable sale. There was no way that the

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